



Monthly Newsletter

# State of Antitrust

December 2019; Volume 6 Issue 12



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AND MORE...

### **CCI initiates probe against MakeMyTrip - GoIbibo & OYO.**

It all started when Federation of Hotel & Restaurant Associations of India ('Informant') on 04.12.2018 sent letters to MakeMyTrip ('MMT') and GoIbibo (collectively referred as 'MMT-Go') highlighting the grievances of its members relating to the practices indulged in by MMT-Go which include predatory pricing, charging of exorbitant commissions from hotels, denial of market access to Treebo and Fab Hotel, imposing room and price parity, registering illegal and unlicensed bed & breakfast, misrepresentation to the customers by providing incorrect information about delisted hotels on their websites and pocketing hotel service fee. Thereafter, the Informant wrote a letter on 10.12.2018 to OYO pointing out certain anti-competitive issues pertaining to their operations.

As the Informant could not receive any redressal to its grievances, it filed the information before the Competition Commission of India ('CCI') alleging that MMT, GoIbibo and OYO ('Opposite Parties'/'OPs') abused their respective dominant positions and entered into anti-competitive agreements in violation of the provisions of the Competition Act 2002 ('Act').

The CCI decided to call the parties for a preliminary conference. The CCI heard the parties on 06.08.2019 and gave liberty to the parties to file written submissions/synopsis. The CCI perused the material brought on record and discussed each allegation in detail. With respect to allegation of collective abuse of dominant position by the OPs, the CCI outrightly rejected the same for being beyond the legal framework of section 4 of the Act.

So, for unilateral abusive conduct of OPs, the CCI delineated the relevant market by looking into the nature of the businesses of the OPs and noted that OPs essentially operate as platforms catering to two sides or two sets of consumers – one that consists of consumers searching for hotels for booking/occupancy and the other that comprises hoteliers or hotel partners who use the services of these platforms to sell their hotel rooms. As the allegations were made by the Informant being a representative body of hoteliers, thus, the CCI delineated the relevant market from the perspective of hoteliers. Since, in a similar case against OYO, Case No.03 of 2019, the hospitality sector was examined to assess the position of OYO, relying on the same, the CCI delineated relevant market with regard to OYO as '*market for franchising services for budget hotels in India*'.

With regard to MMT-Go, the CCI noted that for hotels, there are three booking channels *i.e.*, direct booking, offline booking through travel agents and booking through Online Travel Agency ('OTA'). The CCI looked at the growing importance of online platforms for visibility and discoverability of hotels and that online mode of distribution through third party platforms such as those of MMT-Go, which provide the facility to search, compare and book at the same place, is characteristically distinct from the services that the offline mode such as travel agents provide. Thus, the CCI delineated the relevant market for MMT-Go as '*market for online intermediation services for booking of hotels in India*'.

After delineating the relevant market, the assessment of dominant position was done. The Informant brought on record the abnormal growth rate of 40% at which the MMT-Go grew in the year 2018 and highlighted MMT-Go's own investor presentation which showed that MMT-Go possess 63% market share in the OTA segment in India. MMT-Go countered the same by relying on the CCI's order in approving acquisition of 100% of Ibibo Group Holdings by MMT wherein, the CCI observed that MMT-Go together accounted for less than 11% of the overall travel market in India. The CCI was convinced by the investor's presentation report and MMT-Go was considered dominant in the relevant market.

With respect to the assessment of dominant position of OYO, the CCI relied on Case No. 03 of 2019 and noted that the market dynamics had not changed since the passing of that order to warrant a different outcome in the present case. Hence, OYO was not found to be in dominant position.

As MMT-Go were found to be in a dominant position, therefore, the CCI proceeded ahead to examine the alleged anti-competitive practices of MMT-Go. The CCI opined that room parity and price parity may result in increase in commission charged by MMT-Go which will directly result in increase in final price paid by the consumers and removal of Treebo & Fab hotel, which were closest competitors of OYO, may potentially contravene the provisions of Section 3(4) of the Act. With respect to predatory pricing, the CCI opined, as there was no information on the cost structure and discounts offered by MMT-Go, therefore, the same merits investigation. The CCI observed that the allegation of exorbitant commission could not be conclusively determined by comparing the same with the price of competitors. On the alleged conduct of misrepresenting the information of the hotels, the CCI found it to be against consumer welfare as the prospective consumers who may be interested in booking a hotel rooms will be given misrepresented information in order to manipulate their choices in favour of hotels, which are available at MMT-Go's platform. Based on the above examination of allegations, the CCI directed the Director General to cause an investigation into violation of 3(4) and 4 of the Act by MMT-Go and section 3(4) of the Act by OYO.

*(Case No. 14 of 2019)*



## Heard at the BAR

*Legal news from India and the world*

### **The French and German Competition Authorities present joint study on algorithms and competition**

In a joint conceptual project – Algorithms and Competition – the Autorité de la concurrence (France) and the Bundeskartellamt (Germany) studied potential competitive risks that might be associated with algorithms. They elaborated on the concept of algorithm and their application in different fields.

In their study, the two authorities focused, in particular, on pricing algorithms and collusion, but also considered potential interdependencies between algorithms and the market power of the companies. The two authorities also discussed the practical challenges faced while investigating algorithms.

The study on “Algorithms and Competition” as well as an executive summary is available on the websites of the Autorité de la concurrence and the Bundeskartellamt.

*(Press Release 06.11.2019)*

### **Czech Competition Authority confirms fine imposed on Booking.com for prohibited vertical agreement.**

The Office for the Protection of Competition, rejected the appeal filed by Booking.com B.V. (Booking.com) and confirmed the fine amounting to CZK 8,336,000 imposed on it for entering into prohibited vertical agreements with companies providing short-term accommodation services.

From 1<sup>st</sup> May 2009 to 30<sup>th</sup> June 2015, Booking.com concluded prohibited vertical agreements with short-term accommodation services providers within the territory of Czech Republic, which led to distortion of competition in the market.

The conduct of the Booking.com also affected the services relating to online reservation of short-term accommodation (lodging) services between Member states of the European Union. The Booking.com used to impose obligation on its contractual

partners to comply with the so-called broad price and availability parity.

Due to this obligation, Booking.com could avail same or better conditions on rooms than those published on the websites of the accommodation facilities or at other online or offline distribution channel of accommodation facility.

This stipulation restricted accommodation facilities to determine its own pricing policy, further accommodation facilities were not allowed to offer better conditions (lower prices, higher availability) than the ones arranged with Booking.com. As result, the competitors of Booking.com could not get better conditions from the accommodation facilities.

By its conduct, Booking.com prevented competition in the market, which otherwise, could have led to better prices and conditions being offered to the consumers looking for short-term accommodation.

The Office for the Protection of Competition found the infringement to be in violation of competition law, and confirmed the findings of the first-instance decision including the amount of fine imposed.

*(Press Release 11.11.2019)*

### **Rail merger in the UK raises competition concerns**

The Competition and Markets Authority (‘CMA’) of United Kingdom has raised competition concerns in the grant of new rail franchises to a joint venture between FirstGroup and Trenitalia.

Following the Phase 1 investigation, the CMA found competition concerns on 21 routes- 17 between Preston and Scotland and remaining 4 between Oxenholme and Carlisle.

The CMA is concerned that awarding of West Coast Rail franchise to the joint venture will restrict the choice of consumers, as the consumers will only be able to choose from West Coast Rail for 17 routes operate by the joint venture or TransPennine Express, operated solely by FirstGroup.

On the 4 remaining routes, passengers can only choose from 3 operators in total: West Coast Rail, TransPennine Express and one other operator.

This could limit the alternatives for the consumers and may also lead to higher fares and less availability of cheaper tickets.

The companies now have the opportunity to offer methods to address the CMA’s concerns.

*(Press Release 07.11.2019)*

### **FTC directs Otto Bock to disinvest Freedom Innovations assets to an FTC approved buyer**

The Federal Trade Commission (‘FTC’) issued an Opinion and a Final Order upholding the Administrative Law Judge’s decision that the consummated acquisition of Freedom Innovations by Otto Bock HealthCare North America, Inc. resulted in anticompetitive harm in the microprocessor prosthetic knee market.

Both the companies are top sellers of prosthetic knees equipped with Microprocessors (MPKs).

MPKs use microprocessors to adjust the stiffness and positioning of the joint in response to variations in walking rhythm and ground conditions, providing a stable platform for amputees.

The FTC’s order requires Otto Bock to divest the Freedom Innovations assets to an FTC-approved buyer.

*(Press Release 07.11.2019)*

## **The Delhi High Court orders Director General's investigation report not sacrosanct**

The Hon'ble Delhi High Court ('DHC'), in the case of *Saurabh Tripathy vs. Competition Commission of India & Anr.*, has, without any hesitation, held that the Competition Commission of India ('CCI') has the discretion to close the matter even when the report of the Director General ('DG') recommends contravention to the provisions of the Competition Act, 2002.

Mr. Saurabh Tripathy ('Petitioner'), who is the employee of M/s SRMB Srijan Ltd. ('SRMB'), filed the Information before the CCI, alleging that Great Eastern Energy Corporation Ltd ('GEECL') had violated the provisions of Section 4(1) of the Act by imposing unfair and discriminatory conditions for supply of Coalbed Methane Gas (CBM) in terms of the Gas Sale Purchase Agreement ('GSPA').

The CCI, *vide* its order dated 29.12.2014, directed the DG to investigate into the matter. The DG conducted the investigation as directed and submitted a confidential version of its report on 28.12.2015. The DG in his report concluded that the terms of GSPA were unfair and discriminatory hence, GEECL violated the provision of section 4 of the Act. After considering the DG report, the CCI sought for objections/suggestions from the opposite parties and called them for an oral hearing on 12.12.2016. Later, the CCI, after rejecting the DG report, closed the matter by passing an order under Section 26(6) ('Impugned Order'). Aggrieved by the Impugned Order, the Petitioner appealed before Competition Appellate Tribunal ('COMPAT') which rejected the matter for being not maintainable.

At last, the Petitioner invoked writ jurisdiction of the DHC contending that the Impugned order is *ex facie* erroneous, as the CCI had rejected the report submitted by the DG establishing that the provisions of Section 4 of the Act had been contravened. The Petitioner contended that the CCI was required to direct further inquiry as contemplated under Section 26(8) of the Act and it was not open for CCI to summarily reject the DG report which, after investigation, had found contravention of provisions of Section 4 of the Act. Further, the Petitioner contended that the Impugned Order is also violative of the principles of natural justice as no further opportunity was granted to the Petitioner to contest the premise on which the CCI rejected the DG's report. The Petitioner claimed that the CCI was required to indicate the reasons on the basis of which it proposed to reject the DG's report before proceeding further, in order to enable the Petitioner to contest the same and, thus, the failure on the part of the CCI to do so has resulted in violation of the principles of natural justice.

The DHC examined Section 26(8) and noted that further inquiry can only be given when two conditions are satisfied *i.e.*, the DG's report recommend that there are contraventions and the CCI is of the opinion that further inquiry is called for. If both the aforesaid conditions are satisfied, further inquiry may be conducted by the CCI by itself or by issuing appropriate directions to the DG for such enquiry. The DHC further opined that when the CCI is of the view that no further inquiry is required, it would not be necessary for the CCI to conduct any further inquiry or issue any such directions for the DG to conduct the same. There is no provision in the Act mandating that the CCI must accept the DG's report recommending contraventions of the provisions of the Act. The DG's report is not binding on the CCI and it can differ with the DG's findings and reject the same. Further, the DHC stated that if the Petitioner's contention that it is mandatory for CCI to direct further investigation if it disagrees with the DG's recommendations is accepted, it would imply that the CCI can never disagree with the report submitted by the DG. This, clearly, is not the scheme of Sections 26 and 27 of the Act. The report submitted by the DG under Section 26(3) of the Act is merely recommendatory. Therefore, on the basis of above reasoning the DHC confirmed the Impugned Order of the CCI and rejected the writ petition.

**(W.P. (C) 2079/2018, Judgment dated 10.10.2019)**

### **KK Sharma Law Offices**

An initiative of Kaushal Kumar Sharma, ex-IRS, former Director General & Head of Merger Control and Anti Trust Divisions, Competition Commission of India, former Commissioner of Income Tax



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